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NTSB Order No. EA-4345

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of March, 1995

_____)	
BLAKE W. THOMAS,)	
)	
Applicant,)	
)	
v.)	
)	Docket 189-EAJA-SE-13182
DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Applicant has appealed from the initial decision of Administrative Law Judge William R. Mullins, served August 11, 1994, denying applicant's request for \$6,787.89 in attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.¹ For the reasons discussed below, applicant's appeal is denied and the initial decision is affirmed.

¹ A copy of the initial decision is attached.

Background

This EAJA claim arose from an enforcement action in which applicant was charged with careless operation and fuel mismanagement in connection with the flight of a Maridon Starduster biplane on July 24, 1991, which terminated with a crash landing into trees.² In support of his position that the crash was due to fuel exhaustion, the Administrator presented testimony from the other occupant of the tandem-seat aircraft, Dennis Whipple. Mr. Whipple testified that he had been receiving flight instruction from applicant, and the two had just completed some touch and go landings. Mr. Whipple, who was at that time occupying the rear seat (the only seat equipped with a fuel gauge), informed applicant that the gauge indicated almost empty. When they discovered there was no fuel available at the airport, Mr. Whipple recommended they call someone to bring them a can of

² Specifically, applicant was charged with violating the following regulations (14 C.F.R.):

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.151 Fuel requirements for flight in VFR conditions.

(a) No person may begin a flight in an airplane under VFR conditions unless (considering wind and forecast weather conditions) there is enough fuel to fly to the first point of intended landing and, assuming normal cruising speed --

(1) During the day, to fly after that for at least 30 minutes[.]

* * *

fuel. However, after measuring the fuel in the tank with what he claimed was a calibrated dip stick, applicant said they had five or six gallons³ and assured Mr. Whipple this would be enough for what he estimated would be only a four or five-minute flight to their destination airport some eight miles away.

Mr. Whipple testified that he was reluctant to take off with so little fuel in the aircraft, but he deferred to applicant's judgment since Mr. Whipple viewed him as the more experienced pilot. After takeoff, applicant provided compass headings to Mr. Whipple, who was flying the aircraft from the rear seat.⁴ However, apparently due to Mr. Whipple's unfamiliarity with the area, they found themselves off course and heading in the wrong direction. They got back on course, but before reaching their destination airport the engine stopped suddenly. Applicant took control of the aircraft and executed a crash-landing into some trees. Both occupants were injured, applicant severely, and the

³ Applicant testified that he measured about six or seven gallons in the tank. In his summary of the evidence, the law judge repeated the lower figures given by Mr. Whipple. (Tr. 346.)

⁴ Applicant -- who sat in the front seat (equipped with a stick, rudder, and throttle, but without any instruments or brakes) -- denied that he was still instructing Mr. Whipple during the subject flight, or that he was acting as pilot-in-command of the aircraft. Mr. Whipple maintained that applicant never indicated the instruction was over, and he felt that applicant was pilot-in-command of this flight. However, we need not address this issue since the regulations charged are not predicated on the violator serving as pilot-in-command, and applicant's counsel conceded as much. (Tr. 330.) Accordingly, the law judge's gratuitous finding that applicant was not acting as pilot-in-command on this flight is irrelevant to our evaluation of the EAJA claim.

aircraft was extensively damaged.

Of particular significance to the Administrator's case was Mr. Whipple's testimony that they flew for approximately 30 minutes before the crash. Based on his experience with a similar engine in a different type of aircraft, he estimated that the engine would have burned about fifteen gallons per hour in cruise flight. Accordingly, in view of the small amount of fuel they started out with, Mr. Whipple attributed the engine failure and subsequent crash to fuel exhaustion. Also significant, in light of applicant's claim that he saw fuel running out of the ruptured fuel tank just after the crash, was Mr. Whipple's testimony that he did not see or smell any fuel after the accident. This was corroborated by a local firefighter who responded to the crash site approximately 30-45 minutes after the crash. He testified that he detected no evidence of fuel spillage either. Nor did the mechanic or the FAA inspector who visited the site in the days after the accident see or smell any spilled fuel.⁵

⁵ In support of the alleged violation of section 91.151(a)(1) [requiring sufficient fuel to fly to the first point of intended landing plus a 30-minute reserve], the Administrator introduced a letter, signed by applicant, indicating that he took off with only a 20-minute fuel reserve. Applicant argued that no weight should be given to this letter because, though admittedly signed by applicant, it was written by his sister and submitted under pressure from the FAA at a time when he was still mentally and physically incapacitated by his injuries and under heavy medication. However, there is no indication that the Administrator knew that applicant had not written the letter himself until the time of the hearing. The law judge was apparently not persuaded that applicant's letter established a violation of section 91.151(a)(1). However, this does not render the Administrator's case, or his reliance on the letter, lacking in substantial justification.

In his defense, applicant testified that -- contrary to Mr. Whipple's testimony that they flew for 30 minutes -- the flight lasted only 15 minutes. There is no aircraft manual for this experimental aircraft and, hence, no official source of fuel consumption figures. However, based on his seven hours of experience in this aircraft, applicant estimated that it was burning approximately ten gallons of fuel per hour in cruise flight. Applicant stated that, because there was no mention of unusable fuel in the abbreviated literature which accompanied the aircraft, he assumed that all the fuel was usable. He claimed that he saw fuel running out of the fuel tank after the crash. He hypothesized that the cause of the crash was some sort of ignition trouble.

Applicant also offered the testimony of several witnesses who examined the aircraft and the engine (which had been removed from the aircraft) after they were moved from the crash site to a nearby barn. They testified that there was a hole in the fuel tank, and that the gascolator was still almost full of fuel. One of these witnesses, a friend of applicant's who is also an aircraft mechanic, testified that when he pulled the throttle linkage on the carburetor three or four times, he saw some fuel dripping out, and heard a stream of fuel spraying into the venturi of the carburetor. This witness,⁶ and three other witnesses -- all of whom were friends or relatives of

⁶ The witness is a mechanic who works for Delta Air Lines, but has limited experience with general aviation aircraft.

applicant's, and generally less experienced than the Administrator's experts -- opined that, in light of the fuel found in the gascolator and carburetor, they did not think the cause of the crash could have been fuel exhaustion.

The Administrator's expert witnesses did not dispute applicant's contentions that the fuel tank was ruptured in the crash, or that the gascolator and carburetor contained fuel after the crash. However, they explained that because of the way a gravity-fed fuel system works, some of the fuel will always be unusable and, accordingly, the presence of a small amount of fuel in these areas is not inconsistent with engine stoppage due to fuel exhaustion. No other malfunctions or abnormalities were found in their post-crash inspection of the aircraft.

The law judge was not convinced that the preponderance of the evidence established that the crash was due to fuel starvation. He recognized that the fuel on board would have been exhausted in the length of time Mr. Whipple estimated they had flown but, in light of his dismissal of the charges, he apparently rejected Mr. Whipple's testimony in this regard. The law judge noted applicant's evidence showing the presence of fuel in the gascolator and carburetor and his testimony that the engine stopped abruptly, without sputtering, as would normally be expected with fuel exhaustion. He suggested that investigators had placed too much emphasis on Mr. Whipple's statements about running out of fuel, and that the physical evidence alone would not have led investigators to suspect fuel exhaustion. The law

judge concluded that the cause of the crash was a "mystery" not answered in this record, and dismissed the charges. The Administrator did not pursue an appeal. This EAJA claim followed.

Applicant's EAJA claim

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). For the Administrator's position to be found substantially justified it must be reasonable in both fact and law, i.e., the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). This standard is less stringent than that applied at the merits phase of the proceeding, where the Administrator must prove his case by a preponderance of the reliable, probative, and substantial evidence. Accordingly, the FAA's failure to prevail on the merits does not preclude a finding that its position was nonetheless substantially justified under the EAJA. See U.S. Jet v. Administrator at 3; Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

The law judge denied applicant's request for EAJA fees and expenses, finding that the Administrator was reasonable in

litigating the case because it turned on credibility findings, and that if those findings had favored the Administrator the charges would have been sustained. He also rejected applicant's assertion that the FAA's investigation was flawed, concluding that -- unlike the investigation in Administrator v. Waingrow, 5 NTSB 372 (1985) -- this investigation was objective and complete.

We agree with the law judge that the Administrator's position (that the aircraft crashed due to fuel exhaustion caused by applicant's fuel mismanagement) was substantially justified. The Administrator's evidence -- indicating that applicant persuaded Mr. Whipple to take off with a very small amount of fuel, and allowed the flight to continue to the point where that amount of fuel would be used up -- was sufficient to support a reasonable inference that the engine failure and crash resulted from fuel exhaustion, and that applicant should have known he had insufficient fuel.

The information offered by applicant at the informal conference, and presented again at the hearing, did not negate the Administrator's case. As explained by the Administrator's witnesses at the hearing, a full gascolator and some fuel remaining in the carburetor is to be expected in cases of fuel exhaustion. The Administrator was not required to accept uncritically applicant's claim that he saw fuel running out of the tank after the crash, a claim which was not substantiated by the other occupant of the aircraft (Mr. Whipple), or by any other

evidence.⁷ Nor was the Administrator's case defeated by applicant's general assertion that the plane had experienced some sort of engine trouble shortly before the crash, since the FAA's investigation -- including a teardown of the engine -- revealed no engine problems.⁸

The law judge's dismissal of the complaint was apparently based on his rejection of the Administrator's expert witness testimony that fuel exhaustion had to have been the cause of the crash, and his acceptance of applicant's experts' testimony that fuel exhaustion could not have been the cause. His decision can also be read as implicitly rejecting some portions of the factual testimony given by Mr. Whipple, specifically his estimate that they flew for 30 minutes prior to the crash. Although it is not clear from his decision denying EAJA fees whether, in stating that "the case turned on the issue of credibility," he was referring to the credibility of expert witnesses or factual witnesses, we think material conflicts in both were involved.

We have held that substantial justification for the FAA's position cannot be found lacking simply because the law judge did not credit the testimony of the Administrator's witnesses.

Martin v. Administrator, NTSB Order No. EA-4280 at 8 (1994).

While this principle has most often been cited when there is a

⁷ The law judge did not address this aspect of applicant's testimony in his initial decision.

⁸ Moreover, the aircraft had received an annual inspection, including an engine and cylinder overhaul, approximately two weeks prior to this accident.

conflict in the testimony of fact witnesses,⁹ and in spite of the fact that the "credibility" of expert testimony is evaluated differently than the credibility of factual testimony,¹⁰ we believe the principle can also be applied in this case, where there were opposing conclusions drawn by expert witnesses. In this case, the Administrator could not be expected to foresee that the law judge would reject his experts' opinions in favor of applicant's.

Moreover, we cannot agree with applicant's claim that the FAA's investigation was inadequate. As explained above, the information offered at the informal conference did not exonerate him. Nor do we agree with applicant that the Administrator was necessarily required to specify exactly how much fuel was required for the flight in order to prove the violations. Although more specific figures on the fuel consumption of this aircraft might have aided the Administrator's case, we think he nonetheless had sufficient evidence to support an inference that, regardless of the exact amount required, applicant did not have enough fuel to complete his flight. In sum, the Administrator was substantially justified in pursuing this action on the evidence described above.

⁹ When key factual issues hinge on witness credibility, the Administrator is substantially justified -- absent some additional dispositive evidence -- in proceeding to a hearing where credibility judgments can be made on those issues. See Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994).

¹⁰ Evaluation of expert testimony is based on the logic, depth, and persuasiveness of that testimony. Administrator v. Van De Hoef, 4 NTSB 1062 (1986).

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and
2. The initial decision denying EAJA fees and expenses is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.